No. 78946-1

J.M. JOHNSON, J. (concurring)—I concur with the majority's holding that the random suspicionless drug testing of middle and high school athletes as conducted in this case is not constitutional. The majority correctly notes that "[t]he question before us is narrow," and its analysis is limited to this particular drug testing program. Majority at 7. I write to emphasize, however, that a minor student's right to privacy, in the secondary school context, is not absolute and thus not all drug testing programs are invalid. After all, a middle and high school drug testing program does not impinge on the jealously guarded private affairs of adult citizens, but on those of adolescents, whose privacy expectations and rights are not the same as those of adults.[1]

Washington's constitution and laws necessarily recognize the special

[1] That it was the parents of the minor students who brought this action illustrates one substantial difference between the rights of minors and the rights of adults. Juveniles also have an entirely separate justice system, Title 13 RCW. Violations otherwise criminal if committed by an adult are not criminal if committed by a minor. RCW 13.04.240. Minors are treated differently under many other Washington laws, e.g., contract laws, labor laws, and voting laws. Clearly, the rights of minors are not coextensive with those of adults.

situation in public schools based on the age of students and the fact it is constitutionally the "paramount duty of the state" to provide for the education of minors. Wash. Const. art. IX, § 1. Thus, a school drug testing program based on individualized reasonable suspicion offends neither the United States Constitution Amendment IV nor article I, section 7 of the Washington Constitution. Under carefully defined circumstances, a random suspicionless drug testing program for high school student athletes, in my opinion, might also be implemented that will meet applicable constitutional requirements.[2]

Standard of Review

When resolving a question of first impression concerning the scope of article I, section 7, we may consider well-reasoned precedents from federal courts and sister jurisdictions. *See State v. Chenoweth*, 160 Wn.2d 454, 470-71, 158 P.3d 595 (2007) (citing *State v. Murray*, 110 Wn.2d 706, 709, 757 P.2d 487 (1988)). Although not binding on this court, such precedents may provide persuasive authority and analysis. *Id.* at 471 (citing *City of Seattle v. Mighty Movers, Inc.*, 152 Wn.2d 343, 356, 96 P.3d 979 (2004)).

Analysis

[2] If these juveniles may not be tested, current drug testing for Washington college athletes under NCAA (National College Athletic Association) programs is problematic, since those athletes have the full constitutional protections of adults. See note 5, *infra*.

A. Defining The Nature of a Secondary Student's Privacy Interest

First, we must consider a high school student's asserted privacy interest. The United States Supreme Court has repeatedly held that school children do retain some rights but do not enjoy the full extensive constitutional protections of adults in our society. If school children had all the same rights as adults, the administration of our schools would creak to a halt under the twin burdens of due process and probable cause. For example, a teacher-ordered school detention would cease to be an effective disciplinary measure and instead be converted into a lawsuit for tortious imprisonment.

Although Washington's Constitution does contain an enhanced right of privacy in article I, section 7, this strict provision was written by our founders with the understanding that the affairs of school children are not so private as those of adults and may be treated differently from those of adults.[3] Common sense dictates this outcome and our jurisprudence supports it.

The separate and important constitutional provision in article IX that

[3] United States Constitution Amendment IV declares, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated" whereas Washington Constitution article I, section 7 provides that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." In addition to being structurally different, the Washington Constitution is notably not based on a reasonableness standard.

basic (K-12) education "is the paramount duty of the state" also supports the conclusion of lower privacy expectations for school children. Wash. Const. art. IX, § 1. A student in a regulated educational environment, where the school stands in loco parentis, clearly does not have the same reasonable expectation of privacy as an adult. The majority acknowledges this proposition: "[g]enerally we have recognized students have a lower expectation of privacy because of the nature of the school environment." Majority at 14. School districts have the statutory authority and responsibility to maintain order and discipline in their schools and to protect the health and safety of their students.[4] In my view, the majority does not fully recognize the necessary corollary; school districts are allowed tools and programs to combat rising drug problems and to fulfill their responsibility as protector of students.

Additionally, in addressing the nature of these student's privacy interests, we should recognize that athletes, whether at the middle school, high school, college, or professional level, have a lower expectation of

[4] In addition to statutory responsibilities for student discipline and safety such as those found in RCW 28A.150.240(2), for example, the Washington Interscholastic Activities Association requires all member schools to adopt rules to discourage use of drugs and alcohol. Clerk's Papers (CP) at 112.

privacy.[5] Secondary school athletes here, with their parents' consent, have voluntarily subjected themselves to rules and regulations that are not enforced against the general student body. The record shows, for example, these students (also with their parents' consent) who play sports in Wahkiakum District agree to an annual invasive physical examination to determine their health status before participating. Indeed, the appellants conceded at argument that these examinations are valid requirements by schools. Wash. State Supreme Court oral argument at 8:50, *York v. Wahkiakum Sch. Dist. No. 200*, No. 78946-1 (May 8, 2007), *audio recording by* TVW, Washington State's Public Affairs Network, *available at* http://www.tvg.org. As the

[5] While the issue is not raised in our current case, we should be mindful of possible unintended consequences that may spring from the majority's holding. If secondary school student athletes, with their attendant lower expectation of privacy, are free from random suspicionless drug searches, it follows that college athletes, who assert full constitutional rights, must also be free from random suspicionless drug testing. *See Univ. of Colo. ex rel. Regents of Univ. of Colo. v. Derdeyn*, 863 P.2d 929, 930 (Colo. 1993) (construing Colorado Constitution article II, section 7 and finding suspicionless searches by the University of Colorado were unconstitutional).

Under the majority's analysis, NCAA testing, which is fairly invasive, is likely per se unconstitutional. The consequence of this holding may be that college athletes in Washington State are not allowed to compete in NCAA competitions. Am. Br. of State of Wash. as Amici Curiae Supp. Resp'ts at 2 n.1 (citing NCAA Division I Manual, Bylaw 3.2.4.7, http://goomer.ncaa.org/wdbctx/LSDBi/LSDBI.home) (failure to consent to the NCAA testing program will result in a student being ineligible to play). *But cf. Hill v. Nat'l Collegiate Athletic Ass'n*, 7 Cal. 4th 1, 865 P.2d 633, 645, 658-59, 26 Cal. Rptr. 2d 834 (1994) (upholding NCAA's random suspicionless drug testing policy, finding that athletes have a diminished expectation of privacy and that private organizations do not have to show a compelling state interest for its programs to be valid).

Court in *Vernonia School District 47J v. Acton*, 515 U.S. 646, 657, 115 S. Ct. 2386, 132 L. Ed. 2d 564 (1995) observed, "[s]chool sports are not for the bashful. They require 'suiting up' before each practice or event, and showering and changing afterwards. Public school locker rooms, the usual sites for these activities, are not notable for the privacy they afford." The majority acknowledges that male athletes at Wahkiakum High School have less expectation of privacy "since there are no dividers between urinals, or between the showers, and athletes routinely undress in each other's presence." Majority at 13 n.8. "Somewhat like adults who choose to participate in a 'closely regulated industry,' students who voluntarily participate in school athletics have reason to expect intrusions upon normal rights and privileges, including privacy." *Acton*, 515 U.S. at 657; *see Skinner v. Ry. Labor Executives' Ass'n,* 489 U.S. 602, 627, 109 S. Ct. 1402, 103 L. Ed. 2d 639 (1989); *United States v. Biswell,* 406 U.S. 311, 316, 92 S. Ct. 1593, 32 L. Ed. 2d 87 (1972).

The nature of athletic competition also supports the conclusion that athletes have a lower expectation of privacy in regards to drug testing. Athletes face enormous pressure to excel in competition and may turn to

performance-enhancing drugs such as steroids.[6] Taking performance-enhancing drugs, or "doping," is not only dangerous to the user, but potentially to out-matched opponents. Such drugs also undermine the integrity of athletic competitions. Even the taking of recreational drugs while playing sports raises safety issues. Certain drugs may keep athletes from awareness of pain from injury, allowing severe—even career-ending or life-threatening—problems. The *Acton* Court recognized that in athletic competitions, "the risk of immediate physical harm to the drug user or those with whom he is playing his sport is particularly high." 515 U.S. at 662. Justice Ginsburg in her dissent in *Board of Education of Independent School District No. 92 v. Earls,* 536 U.S. 822, 846, 122 S. Ct. 2559, 153 L. Ed. 2d 735 (2002), similarly noted that "[s]chools regulate student athletes discretely because competitive school sports . . . expose students to physical risks that schools have a duty to mitigate." The legislature has expressly entrusted school districts with responsibility "to control, supervise and regulate the conduct of interschool athletic activities . . . ." RCW 28A.600.200. Our

[6] One study of nearly 5,000 secondary school students reported that "5.4% of boys and 2.9% of girls had used steroids in the past year." Tracy Hampton, *Researchers Address Use of Performance-Enhancing Drugs in Nonelite Athletes,* 295 J. Am. Med. Ass'n 607 (2006) (citing L.M. Irving et al., 30 J. Adolescent Health 243 (2002)).

constitution allows school districts adequate avenues for proper programs to fulfill these responsibilities and to thereby protect students and avoid potential school liability.

B. Is There an Intrusion into Private Affairs of Students?

Even in light of the lower privacy interest of students and the even lower privacy interest of minors as student athletes, there is little doubt that requiring this urinalysis test is a significant invasion of privacy. In *Robinson v. City of Seattle,* 102 Wn. App. 795, 818, 10 P.3d 452 (2000), the Court of Appeals opined that "[i]t is difficult to imagine an affair more private than the passing of urine." The United States Supreme Court similarly observed in reference to urination, "'[m]ost people describe it by euphemisms if they talk about it at all. It is a function traditionally performed without public observation; indeed, its performance in public is generally prohibited by law as well as social custom.'" *Skinner,* 489 U.S. at 617 (quoting *Nat'l Treasury Employees Union v. Von Raab,* 816 F.2d 170, 175 (5th Cir. 1987), *aff'd in part and vacated in part*, 489 U.S. 656, 109 S. Ct. 1384, 103 L. Ed. 2d 685 (1989)).

There is "no doubt that the privacy interest in the body and bodily

functions is one Washington citizens have held, and should be entitled to hold, safe from governmental trespass." *Robinson*, 102 Wn. App. at 819. As an indisputable invasion of privacy,[7] requiring a urinalysis test without probable cause of drug use must be authorized by the authority of law under our constitution.

C. Does Washington Recognize a Special Needs Exception in Schools?

We now turn to whether there is a special needs exception to the constitutional authority of law requirement. In Washington, warrantless searches of free adults are per se unreasonable unless fitting within one of the "'jealously and carefully drawn' exceptions." *State v. Hendrickson*, 129 Wn.2d 61, 70, 917 P.2d 563 (1996) (internal quotation marks omitted) (quoting *State v. Houser*, 95 Wn.2d 143, 149, 622 P.2d 1218 (1980)); *see also* majority at 16. However, where the state demonstrates a "special need," the "authority of law" requirement may be satisfied in select cases. Washington common law recognizes "special needs" in certain areas and has impliedly identified a "special environment" in public schools, albeit different from that recognized by federal courts.

[7] We further note below that technology improvements allow much less invasive techniques; both saliva testing and "sweat patches" are now available to test for drugs.

Blood testing is arguably more invasive than urinalysis, yet we have held that those convicted of sexual crimes (or in the case of juveniles, those adjudicated to have committed sexual offenses) can be tested for HIV due to a special need. *See In re Juveniles A, B, C, D, E,* 121 Wn.2d 80, 847 P.2d 455 (1993); *see also State v. Olivas*, 122 Wn.2d 73, 856 P.2d 1076 (1993) (warrantless blood tests of violent and sex offenders are valid under both the United States and Washington Constitutions). Additionally, in *State v. Curran*, 116 Wn.2d 174, 804 P.2d 558 (1991) (*abrogated on other grounds by State v. Berlin*, 133 Wn.2d 541, 548, 947 P.2d 700 (1997)), this court held that blood testing a motorist for intoxication does not violate article I, section 7 if the test is performed in a reasonable manner and there is an indication that it would reveal evidence of intoxication. While the Court of Appeals in *Robinson,* 102 Wn. App. at 813 n.50, recognized that Washington offers higher protection for bodily functions compared to the federal courts, that same court held that the City of Seattle could test those individuals responsible for public safety for drug use without a warrant or individualized suspicion. *Id.* at 827-28. This court has not addressed such programs.

In *State v. Surge*, 160 Wn.2d 65, 156 P.3d 208 (2007), we allowed

warrantless DNA sampling of prisoners without individualized suspicion. The majority observes that students are not convicted criminals. Majority at 23. This is true but not determinative. Clearly, the definitions of constitutional protection and the privacy expectations ("private affairs") are different between students and criminals. These distinctions do not determine the entire constitutional analysis, but both groups do have a lowered reasonable expectation of privacy. *See* Charles W. Johnson, *Survey of Washington Search and Seizure Law: 2005 Update*, 28 Seattle U. L. Rev. 467, 687 (2005) (recognizing a "special environments" category of searches applicable to public schools, prisons, the international border, and administrative searches). The current statute providing for search of school lockers exemplifies the lower expectation of privacy recognized in schools. RCW 28A.600.220 specifically states:

> No right nor expectation of privacy exists for any student as to the use of any locker issued or assigned to a student by a school and the locker shall be subject to search for illegal drugs, weapons, and contraband as provided in RCW 28A.600.210 through 28A.600.240.

This statute is just one example of the special environment that Washington has recognized in the school setting.[8] Although the parameters

[8] Another example of a student's lowered expectation of reasonable privacy contrasted

of the public school special environment have not been clearly defined in all areas, the following section concludes a drug testing program based on individualized suspicion is sustainable under article I, section 7.

D. Individualized Suspicion Justifies Testing

The United States Supreme Court's jurisprudence holds that the Fourth Amendment, with its "unreasonable search" protections, allows public schools to randomly drug test student athletes. *Acton,* 515 U.S. 646; *Earls,* 536 U.S. 822. I agree with the majority that the protections of article I, section 7 are greater. I find persuasive a prior case in that Court that required individualized suspicion before the search could take place, thereby articulating a standard more deferential to privacy rights (more analogous to our constitution's). *See New Jersey v. T.L.O.*, 469 U.S. 325, 341, 105 S. Ct. 733, 83 L. Ed. 2d 720 (1985).

In my opinion, the *T.L.O.* deferential standard for suspicion searches could pass Washington's stricter privacy test. As mentioned *infra* note 3,

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with a compelling state need is the issue of compulsory vaccinations. The state may enact reasonable regulations to protect the public health and public safety of school children, and compulsory immunization is a permissible exercise of the state's police power. *Zucht v. King*, 260 U.S. 174, 176, 43 S. Ct. 24, 67 L. Ed. 194 (1922); *Jacobson v. Massachusetts*, 197 U.S. 11, 24-25, 25 S. Ct. 358, 49 L. Ed. 643 (1905). While this issue is rarely analyzed in a Fourth Amendment context, it also illuminates a special environment and lowered privacy expectation within the educational context.

article I, section 7 and the Fourth Amendment are structurally different and the Washington Constitution protects "private affairs" and not only against "unreasonable searches." Still, the *T.L.O.* reasoning is persuasive because it balances the privacy rights of minor students and the administrative responsibilities of school officers.

The *T.L.O.* Court reasoned that searches in a school environment are analogous to those conducted in a similar administrative context, relying on its previous analysis in *Camara v. Municipal Court*, 387 U.S. 523, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967). *See T.L.O.,* 469 U.S. at 340-41. The *T.L.O.* Court held that school teachers and administrators could initiate a search if: (1) there existed "reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school"; and (2) the search is "not excessively intrusive in light of the age and sex of the student and the nature of the infraction." *Id.* at 342. The Washington Legislature adopted our current statute governing searches of students and students' possessions that mirrors this "reasonable grounds" test from *T.L.O.* RCW 28A.600.230.[9]

[9]"(1) A school principal, vice principal, or principal's designee may search a student, the student's possessions, and the student's locker, if the principal, vice principal, or principal's designee has reasonable grounds to suspect that the search will yield evidence of the

In *Acton*, the majority took issue with the *T.L.O.* Court's use of individualized suspicion, arguing that requiring individualized suspicion would interfere with the school's drug prevention goals and possibly worsen the situation. *See* 515 U.S. at 663-64 (suggesting that teachers and school officials are not trained to detect drug use, teachers might claim any problematic student is using drugs, using individualized suspicion would turn the drug testing process into a badge of shame, and individualized suspicion creates a needless loss of resources in defending against claims of arbitrary imposition). Justice O'Connor in her forceful dissent in *Acton,* however, addressed the effectiveness of a drug program based on reasonable suspicion:

> [N]owhere is it *less* clear that an individualized suspicion requirement would be ineffectual than in the school context. In most schools, the entire pool of potential search targets—students—is under constant supervision by teachers and administrators and coaches, be it in classrooms, hallways, or locker rooms.

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student's violation of the law or school rules. A search is mandatory if there are reasonable grounds to suspect a student has illegally possessed a firearm in violation of RCW 9.41.280.

"(2) Except as provided in subsection (3) of this section, the scope of the search is proper if the search is conducted as follows:

"(a) The methods used are reasonably related to the objectives of the search; and

"(b) Is not excessively intrusive in light of the age and sex of the student and the nature of the suspected infraction.

"(3) A principal or vice principal or anyone acting under their direction may not subject a student to a strip search or body cavity search as those terms are defined in RCW 10.79.070."

> . . . The great irony of this case is that most (though not all) of the evidence the District introduced to justify its suspicionless drug testing program consisted of first- or second-hand stories of particular, identifiable students acting in ways that plainly gave rise to reasonable suspicion of in-school drug use—and thus that would have justified a drug-related search under our *T.L.O.* decision.

Id. at 678-79 (O'Connor, J., dissenting) (citation omitted).

The implementation of a school drug testing program based on individualized suspicion is undoubtedly improved with training of teachers, counselors, and/or staff to detect signs of drug use. Many drugs have easily recognizable physical manifestations: glazed appearance of eyes, dilated pupils, slurred speech, distinct odors on breath, etc.[10] Justice O'Connor observed in her dissent in *Acton*:

> Schools already have adversarial, disciplinary schemes that require teachers and administrators in many areas besides drug use to investigate student wrongdoing (often by means of accusatory searches); to make determinations about whether the wrongdoing occurred; and to impose punishment. To such a scheme, suspicion-based drug testing would be only a minor addition.

515 U.S. at 677 (O'Connor, J., dissenting).

Justice O'Connor also emphasized that, "The [majority's] fear that a

[10] *See* Nat'l Inst. on Drug Abuse*, Commonly Abused Drugs available at* http://www.nida.nih.gov/DrugPages/DrugsofAbuse.html (last modified Jan. 2, 2008) (listing the intoxicating effects of different drugs).

suspicion-based regime will lead to the testing of 'troublesome but not drug-likely' students . . . ignores that the required level of suspicion in the school context is objectively *reasonable* suspicion." *Id.* at 676-77 (O'Connor, J., dissenting). In *State v. McKinnon,* 88 Wn.2d 75, 81, 558 P.2d 781 (1977), this court outlined factors relevant to determining whether a school official in fact had reasonable suspicion: "the child's age, history, and school record, the prevalence and seriousness of the problem in the school to which the search was directed, the exigency to make the search without delay, and the probative value and reliability of the information used as a justification for the search."

Admittedly, a drug program based only on individualized reasonable suspicion is not without problems, but such a program would result in a greater protection of constitutional rights.[11] Furthermore, a program based on individualized reasonable suspicion might often provide more deterrence to student drug use than a random suspicionless program. Under a random regime, students might take their chances that they will not be one of the very few unlucky students selected for drug testing. But under a reasonable

[11] Justice O'Connor also noted that "any distress arising from what turns out to be a false accusation can be minimized by keeping the entire process confidential." *Acton*, 515 U.S at 677 (O'Connor, J., dissenting).

suspicion regime, if students show signs of drug use, there is a higher probability of getting tested. As in *Acton*, "there is a substantial basis for concluding that a vigorous regime of suspicion-based testing . . . would have gone a long way toward solving [the District's] school drug problem while preserving the Fourth Amendment rights of [students]." 515 U.S. at 679-80, (O'Connor, J., dissenting).

Thus, the United States Supreme Court and prior cases in this court have held that requiring "reasonable" or "individualized" suspicion before commencing a search is sufficient to protect a student's right to privacy and still allow school officials to do their job. *T.L.O.,* 469 U.S. at 341-42; *McKinnon*, 88 Wn.2d at 81 ("We hold that the search of a student's person is reasonable and does not violate his Fourth Amendment rights, if the school official has reasonable grounds to believe the search is necessary in the aid of maintaining school discipline and order."). While *McKinnon* was decided before *Acton*, we have never revisited the case and it remains a correct statement of Washington law. *See also State v. Slattery*, 56 Wn. App. 820, 823, 787 P.2d 932 (1990) ("Under the school search exception, school officials may search students if, under all the circumstances, the search is

reasonable."); *State v. B.A.S.*, 103 Wn. App. 549, 554 n.8, 13 P.3d 244 (2000) (specifically adopting a reasonableness search standard).

Thus, our decisions allow a reasonable search or test using the *T.L.O.* individualized reasonable suspicion standard. The legislature could further define the factors to be considered by law in a similar fashion as they have previously specified school interests in statute. For example, RCW 28A.600.210 notes the important policy considerations favoring a reasonable search standard and applies that standard to school lockers.[12]

A student may be drug tested if a coach or school administrator can articulate a reasonable suspicion of drug use. In my view, Washington has implicitly accepted this view of private affairs through a special environments exception under article I, section 7.

E. Random Suspicionless Drug Testing of Athletes

Although I believe that the random testing program as conducted here was invalid, I do not think that random suspicionless drug testing of middle

[12] "The legislature finds that illegal drug activity and weapons in schools threaten the safety and welfare of school children and pose a severe threat to the state educational system. School officials need authority to maintain order and discipline in schools and to protect students from exposure to illegal drugs, weapons, and contraband. Searches of school-issued lockers and the contents of those lockers is a reasonable and necessary tool to protect the interests of the students of the state as a whole."

and high school athletes is categorically unconstitutional even under Washington's protective constitution article I, section 7.[13] Many drugs, especially performance-enhancement drugs, present substantial risks but are not easily detected under an individualized reasonable suspicion scheme. Some physical manifestations of these drugs, e.g., increase in muscle mass and acne, also occur naturally among some high school and middle school students.[14] As mentioned *infra,* drug use among athletes not only affects the integrity of athletic competition but also entails safety concerns not inherent in other activities and for which the district has some responsibility. A steroid or methamphetamine-using athlete may pose both a much higher risk of harm to himself and threat of injury to others, including his opponents.

Although random suspicionless drug testing is a significant invasion of privacy, the privacy expectations of minor school students, of minor student athletes, are less than those of adults. Under certain circumstances, the

[13] Although there is no Washington case law as of yet upholding random suspicionless searches in the school context, suspicionless searches of lockers are statutorily authorized in schools. "RCW 28A.600.240 **School locker searches--Notice and reasonable suspicion requirements.** (1) In addition to the provisions in RCW 28A.600.230, the school principal, vice principal, or principal's designee may search all student lockers at any time without prior notice and without a reasonable suspicion that the search will yield evidence of any particular student's violation of the law or school rule."

[14] Identifying adolescents and children who use performance-enhancing substances can even be difficult for physicians. Hampton, *supra,* at 607.

balance between the government's interest in suspicionless drug testing and student athletes' privacy rights might weigh in favor of testing. It is premature, and the record is insufficient, to articulate the specific circumstances when a suspicionless test would be upheld. We leave the important issue unresolved.[15] The Washington Legislature may be the appropriate place to consider this issue at length; the drug testing arena would benefit from legislative consideration and fact finding.

In my view, a constitutional program of random suspicionless drug testing of student athletes should advance compelling interests, show narrow tailoring, and employ a less intrusive method of testing.[16] The United States Supreme Court in *Acton* recognized the test for a compelling interest is not some "fixed, minimum quantum of governmental concern" but rather whether the government's interest is "important enough" to justify the specific invasion of the constitutional right at issue. 515 U.S. at 661 (emphasis omitted). (Though *Acton* discusses the different federal constitutional protections, this

[15] *See, supra,* note 2 regarding drug testing of college athletes.
[16] Of course, random suspicionless drug tests could be implemented based on parental consent without meeting these requirements. During the 1999-2000 school year, 184 out of 280 students in grades 7-12 in Wahkiakum School District participated in at least one sport. All of the students signed consent forms, and only six forms were signed under protest by a student or a parent. CP at 486. I recognize the claim that some consent forms were not truly voluntary.

test is also appropriate under our constitution's enhanced privacy protections.) Thus, the greater the intrusion into constitutional rights, the more compelling the interests must be. Since we have established that random mandatory urinalyses here are significant invasions of privacy,[17] even of minor students, the standard to prove compelling interest is high, although not impossible.

The *Acton* Court noted that the importance of deterring drug use by our nation's school children can hardly be doubted. *Acton,* 515 U.S. at 661. I agree. But in addition to evidencing a general drug problem among minor students nationally, findings of a local school drug problem are likely required to meet the compelling threshold. Some factors relevant to determining whether a compelling interest in suspicionless drug testing of athletes exists include an abnormally high rate of or a sharp increase in drug use, and a higher drug rate or impact among athletes. In *Acton*, there was even evidence that the athletes were the "leaders of the drug culture." 515 U.S. at 649. Objective evidence of the school's drug problem, through student surveys or reports by teachers and other school officials of student drug use, and also

[17] *But see* note 20, *infra*, discussing less invasive saliva and "sweat patch" tests.

evidence of the drug problem's effect on the functioning of the school might prove compelling.[18]

Although the Supreme Court in *Earls*, 536 U.S. at 836, suggested that it makes little sense to insist a drug problem become severe before it is addressed, that is not proposed for our schools. Drug problems can be addressed early through means other than suspicionless drug testing. Because of its invasive nature, alternative programs such as individualized suspicion possibly may need to be supplemented by a proper program of random suspicionless drug testing.

Narrow tailoring is also likely required. There must be a close fit between the testing proposed and the drug problem. Determining whether the tailoring is sufficiently narrow requires looking beyond the formal justification to the actual reason for the drug testing program.[19]

Although Wahkiakum District did present evidence of a school-wide drug problem, there was no showing that athletes used drugs at a higher rate than other students or that testing the athletes would address the drug problem

[18] Here again, the legislature could address an issue to which it is suited by the fact-finding hearings, deliberative process, and constitutional role.

[19] "Article I, section 7, forbids use of pretext as a justification for a warrantless search or seizure because our constitution requires we look beyond the formal justification for the stop to the actual one." *State v. Ladson*, 138 Wn.2d 343, 353, 979 P.2d 833 (1999).

among the general student body. CP at 486 (the district alleged only that "athletes are involved in the use of illegal drugs and alcohol at least to the same level as are non-athletes.") The district also acknowledged that there is "no evidence that student athletes were leaders in [any] 'drug culture' in its school." CP at 25, ¶ 1.119; *cf. Acton,* 515 U.S. at 649. In the instant case, the district subjected the athletes to random suspicionless testing not because of a higher incidence of drug use, but merely because athletes have lower expectation of privacy. Wahkiakum's random suspicionless drug program was not narrowly tailored to a compelling government interest.

Although some federal courts seem unconcerned with the indignity of urine collection, Washington courts recognize our heightened protections from Washington Constitution's article I, section 7 explicit safeguard for "private affairs." *See Acton,* 515 U.S. at 664; *Robinson*, 102 Wn. App. at 822 (decrying that "all of the citizens who apply for employment . . . must submit to a humiliating procedure in order for the City to learn the chemical content of their urine"). As this case indicates, how a drug test is administered is one important aspect of its constitutionality and a showing of a less intrusive method should be required. *See, e.g., Jacobsen v. City of*

Seattle, 98 Wn.2d 668, 675, 658 P.2d 653 (1983) (finding warrantless pat-down searches of patrons attending rock concerts unconstitutional but noting that "the City might establish less instrusive and more formal procedures for determining the presence of contraband"). Wakhiakum District's drug program was more intrusive and humiliating than necessary to achieve its stated goals. A randomly selected student athlete was publicly removed from class, sometimes by having his or her name called over the intercom, and transported by a school official to the Wakhiakum County Health Department for a sample. CP at 39, 91. Although the urine sample was given in a closed bathroom stall, a health department employee stood outside the stall aurally monitoring the process. CP at 39-40.

There are less intrusive ways of conducting a drug test. Schools (or the legislature) might even consider other technology for drug testing such as saliva samples or sweat patches, which are significantly less intrusive and humiliating.[20]

Conclusion

[20] *See, e.g.,* Office of Nat'l Drug Control Policy, *Developing a Testing Program: Pros and Cons of the Various Drug Testing Methods, available at* http://www.whitehousedrugpolicy.gov/publications/drug_testing/testing.html (last modified Sept. 20, 2002) (contrasting different methods of drug testing).

I concur with the majority's decision in striking down this drug testing program given the record in this particular case. Washington's public schools already have the authority to engage in drug testing where based on individualized reasonable suspicion, and such a program is fully constitutional. I conclude that random suspicionless drug testing may also be devised and conducted under carefully defined circumstances. The legislature may be the appropriate body to consider such a program, I concur.

AUTHOR:
Justice James M. Johnson

WE CONCUR: